TRANSNATIONAL DATA FLOW — PROBLEMS AND STRATEGIES

William Serwatynski
Ph.D. Student in Administration and Marketing Lecturer at
Concordia University
Montreal, Quebec
63 Fourth Avenue
Verdun, Quebec
H4G 2X9

ABSTRACT

Privacy and economic problems associated with transborder data flow are highlighted. The attitudes of various governments, international bodies, and multinational companies, are surveyed, and the need for a working model of the issues involved in discussions of transborder data flow are stressed.

PROBLEMES ET STRATEGIES
DONNEES COURANTS TRANSNATIONAUX

RESUME

Les problèmes de sécurité et d'économie associés avec le transport de données à partir du Canada en direction des Etats-Unis. Les attitudes des différents départements gouvernementaux, des compagnies internationales et multi-nationales sont étudiées. Nous étudions l'importance d'un modèle d'application pour un programme de transport de données.

TRANSACTIONAL DATA FLOW

INTRODUCTION

The term 'Lifeblood of Multinationals' has evolved in recognition of the importance of the flow of information across borders for the multinational companies. Judging the importance of this flow by volume alone, in Canada, for example, it is estimated that by 1985 as much as 80% of the $1.5 billion worth of data processing services Canadian users will be importing each year will be the result of parent-to-subsidiary transactions across the US-Canadian border.

This paper discusses the problems associated with the flow of information across national borders and the resulting strategies adopted by the parties concerned. Since rapid advances in computer and telecommunications technology have combined to accentuate the problems, it was decided to survey some of the major computer journals (Computerworld, Computing Canada, Electronic News and Computing Europe), over the past year as the source for current information on the subject.

PROBLEMS

A survey of the sources indicates that the problems associated with transborder data flow can be classified into three major groups:

1) Economic Problems

The economic problems pertain to employment, balance of payments and retardation of technology.

The practice of foreign-owned companies processing their Canadian data outside the country has been estimated to cost Canadians 30,000 to 40,000 jobs, through either loss or lack of creation. Most visible justification (for controlling transborder data flow) may be the loss of jobs or failure to expand new employment in what should be a growth sector.

In terms of balance of payments, the importation of information processing services resulted in lost revenues for Canada of $150 million to $300 million in 1976, according to estimates developed by the Canadian Government's Department of Communications; whereas the problem of retardation of a nation's technology is summed up in the following: Like Canada, European nations also fear technology within their own borders will be retarded if they routinely send data abroad for more sophisticated processing.

2) Dependence Problems

In a recent report published by the French Ministry of Industry and Research (Paris), they note that despite the availability of basic economic indicators and statistics from the Organization for Economic

Cooperation and Development (OECD) and the International Monetary Funds as well as sources such as the United Nations and World Bank, the monopoly of tools needed for basing modern national economic analysis are on the American informatics networks. This dependence of foreign planners on US data resources and planning methods raises several problems, namely:

i) Compromising National Sovereignty:

Will the control of the tools and data lead to imposing hypotheses, results and thereby indirectly to policy choices?

ii) Threatening National Security:

This threat is perceived on two fronts. Firstly, the greater the flow of various kinds of data outside the nation state, the greater becomes the dependence on stable political conditions in the processing country and in those countries through which the information is transmitted. Secondly, even if political conditions in the processing country remain stable, there is still a danger that a country's data held on foreign data banks may be misappropriated. The recent success with which General Accounting Office was able to remove 38 reels of magnetic tape containing the names and addresses of 1.14 million Americans from the US Social Security Administration's (SSA) central computer facility without SSA's knowledge, no doubt keeps such fears alive.

c) Endangering National Identity

As information is increasingly processed and stored remote from its place of origin, it is argued that there is a need to protect the privacy of citizens and ensure the rights of citizens to access information about themselves by regulating the flow of data across borders. The issue of privacy 'is one of human rights' . . . the individual shouldn't be at the mercy of those who control information. Perhaps the most interesting aspect of the privacy issue is that proponents for the free flow of data across borders argue that the privacy issue is being used to cover up the true interests (as noted above) of the nation states. Is it really individual privacy that is such an important matter? Or are these (privacy) arguments being used to mask true concerns?

STRATEGIES

Given these problems associated with transborder data flow, the following responses can be identified as originating from the parties concerned, namely:

1) The Countries

It would be well to start with Canada's response considering that the Europeans often see themselves in a position comparable to the Canadians when it comes to US Multinational corporations. Canada does not appear to be seriously pursuing the 'privacy aspect' of the transborder data flow problem.

The Federal Government does not attempt to protect the privacy of Canadian individuals and freely allows files for medical information, for insurance, credit card data files, and extensive information on individuals to be held abroad by commercial organizations.

Instead, Canada appears to be pursuing the 'economic aspect' of the transborder data flow problem from the number of statistics the Canadian government has gathered on the resulting unemployment and lost revenue as noted earlier. This may be the best approach for Canada considering that Canada's economy is tied in very closely with that of the U.S. and therefore, it would not be sensible to jeopardize this relationship solely on the 'privacy issue' of transborder data flow. Nevertheless, in studying such questions at present as: 'whether it is necessary to require laws that make it mandatory for the records of Canadian companies to be kept in Canada', Canada's indecision is apparent from the fact that the most the Canadian government can suggest is some form of international agreement on a generally accepted set of ground rules for dealing with these perplexing problems of transborder data flow.

The UK, on the other hand, appears to be more concerned with the 'privacy aspect' of the transborder data flow problem in that their National Council for Civil Liberties (NCCL) has strongly criticized UK laws for providing inadequate privacy protection and has urged that the transfer of personal information abroad be controlled in consideration of the individual's right to privacy. However, the position of the British government must be tempered in view of its many multinational corporations and the fact that they would not want to do anything which would seriously obstruct the performance of British multinational corporations. Nevertheless, the British government has considered ways of controlling data banks, most notable of which appears to be some system of licensing, as favoured by privacy advocates, whereby a statutory licensing authority, independent of the government, would grant licenses for specific uses of personal data and specify a 'sensitivity level' up to which the licensee would be allowed to work on the data.

In terms of the 'privacy issue' France's recent Data Processing and Freedom Act has sparked much controversy in Europe by defining personal data as applying to physical persons only and not legal or corporate persons. The French parliament felt that proprietary data might be compromised if businesses had access to records pertaining to them held by other businesses. But despite this focus on the 'privacy issue', there is reason to believe that France's main concern is with that of the 'dependence aspect' of the transborder data flow problem in that a recent report published by France's Ministry of Industry and Research urged self-sufficiency in French planning strategy to alleviate their current dependence on American economic planning tools and data bases.

West Germany has taken the 'privacy' route in drafting their 1978 Data Regulation Law aimed at protecting individual rights. Essentially, this law requires that, with regard to data held abroad, the data would be treated under conditions 'as they would be domestically', namely, forbidding unauthorized persons, access or input to data processing facilities.

Like Canada, Italy appears to be primarily concerned with the 'economic aspect' of the transborder data flow problem in that Italy's communications authority has made a proposal, agreeable to the entire European Economic Community, to eliminate flat-rate charges for private telephone lines on which volumes of data are now transmitted in favour of volume-sensitive pricing. This would substantially raise the cost to the users and in turn increase revenues for Italy.

Spain, Sweden and Norway, on the other hand, are not only pursuing the 'privacy aspect' of the transborder data flow problem, but all three favour licensing as a solution to the problem.

Finally, Brazil appears to be primarily concerned with the 'dependence aspect' of the transborder data flow problem as it pertains to national security.

Summary

The above discussion in no way claims to be exhaustive of all nation states' responses to the problem of transborder data flow. Indeed, others such as Switzerland, Finland, Japan, are presently preparing to take action on the problem. However, the previous discussion does indicate, judging by the responses of some of these nation states, that the 'privacy issue' is not the only concern (even though it is the most common one) in the transborder data flow problem. Other issues such as the dependence and economic problems arising from transborder data flow are also being given consideration.

2) EEC and OECD

EEC: The EEC Commission in Brussels is drafting a report on the regulation of transborder data flow (i.e. information protection) which is expected to be released by the end of 1978. As background to the

EEC report, it is necessary to understand the work of the Council of Europe and the European Parliament to date.

The Council of Europe, having been given a mandate to develop a data protection convention by Dec. 31, 1979, continues to refine a proposed data protection convention that would provide minimum uniform data protection among member countries. In the spirit of privacy protection, the proposed convention would require a government-run privacy board in each country. Such a convention is, of course, being opposed by the U.S. multinationals on the grounds that it would impose a burdensome and costly layer of restrictions on their international operations, whereas evidence of privacy abuse that would warrant such an agreement has not been presented. Furthermore, the European Computing Services Association (ECSA), in a report to the Council of Europe, warns of the risks of controlling the flow of information across national borders as being isolationism, protectionism, and espionage. Instead of government-run privacy boards in each country, the ECSA suggests a statutory authority, independent of government, to act as a licensing body, supported by fees.

The European Parliament, meanwhile, has been seeking public views on how best to protect individual citizens in member countries from abuses that may result from computerized record-keeping and data banks in both the public and private sector as part of its role of recommending action to the European Commission, which itself has been considering the need for an international agreement or convention that would harmonize or make reciprocal the various national laws on data protection. In response to the European Parliament, IBM Europe has recommended that national privacy laws be limited to physical persons and not concern legal or corporate entities (citing the action of the French Parliament on this issue as noted earlier) and, as for harmonizing the various national data protection policies, IBM Europe noted that such action would reduce the cost of meeting different data protection legislation for the multinationals.

OECD: The OECD is preparing guidelines on transborder data flows for the 24-member countries of the Organization for Economic Cooperation and Development to meet a July 30, 1979, deadline for the first draft of the guidelines. The action of the OECD differs from that of the Council of Europe (and EEC) for two major reasons. Firstly, unlike the Council of Europe, which appears to be primarily concerned with the 'privacy aspect' of the transborder data flow problem, the OECD's central focus is on the 'economic implications' surrounding the free flow of data. Secondly, unlike the Council of Europe's draft treaty, which would be binding on all member countries, the OECD guidelines are seen only as recommendations.

As part of its work toward drafting the forthcoming guidelines, the OECD held a major conference in Vienna last September (1977) on international data flow, but very little was decided at this meeting other than to note that restrictions on the free flow of data would have onerous implications for multinational corporations and that more information on existing applications and on the nature of the data being transmitted was necessary to understand this activity before action could be taken. Toward this end, studies have been commissioned on transborder data flow to outside consultants and will, no doubt, contribute towards OECD's final guidelines.

Summary

The above discussion indicates that the transborder data flow problem is being attacked by major international organizations (like EEC and OECD) not only from the 'privacy aspect' but also from the 'economic aspect' of the problem. Furthermore, the discussion indicates that the views of the public (including business) and not only those of the governments are being solicited in trying to arrive at a solution to this very complex problem.

3) PITs and EURONET

The French Research Institute at Iria predicts that European controls against the influx of U.S. data will be implemented by the national postal, telephone and telegraph (PTT) authorities through higher international rates (tariffs), noting that tariff barriers will prove to be more effective to prevent data exchange than laws which seek to control it because tariff barriers will drastically increase international communication costs, thus inhibiting the expansion of U.S. networks into Europe and encouraging the installation of data processing centers in Europe. In this regard, Italy's proposal for volume-sensitive pricing (vs Flat-rates) of communication lines has already been noted. There appears to be a great deal of concern about such action by the national PTTs, in particular, the Information Industry Association (US) considers rates and tariffs imposed by PTTs as a major threat to the free flow of data across borders. The French Research Institute at Iria has suggested that American multinationals create national subsidiaries jointly with European firms in order to be in a better position to expand their international networks in view of the fact that PTTs are considering setting up national DP (data processing) service bureaus and networks since DP and communications cannot be sold separately.

The Information Industry Association also considers monolithic monopolies such as EURONET (a group of data bases on the EEC's network) as a major threat to the free flow of data across borders. The various national PTTs have begun the marketing of EURONET which is expected to go into use by the end of this year.

Summary

Thus, in addition to non-tariff barriers (such as laws and treaties being enacted by the nation states and international bodies, respectively), tariff barriers (through the PTTs and EURONET) are arising to restrict the free flow of data across borders.

4) U.S. GOVERNMENT

Although the U.S. Government has tried to quell the fears associated with the 'privacy issue' of the transborder data flow problem through the creation of the U.S. Privacy Protection Study Commission, it does not appear to have been successful considering that two of the major proposals of the Commission, that of an individual approach to the privacy problem and reciprocity in privacy protection, have been flatly rejected by the European Community. The individual approach to the privacy problem has been criticized on the grounds that one cannot expect from individual complaints and court cases that they will produce people-oriented data systems; whereas, reciprocity in the protection of personal data traffic is not considered a sufficient guarantee.

However, the U.S. Government has been relatively more successful in moderating negative reactions to the transborder data flow issue through its membership in the OECD, which, as noted earlier, appears to be pursuing the 'economic aspects' of the problem. No doubt, the U.S. Government is using its clout in the OECD (as an equal status member) to counter its rather weak position in the Council of Europe (where U.S. is not a full-member) which appears to be primarily pursuing the 'privacy aspect' of the transborder data flow problem as noted earlier. In particular, the U.S. Government has urged the OECD to develop guidelines for harmonizing national privacy laws.

Perhaps the greatest success the U.S. Government will have in moderating the restrictions being imposed by other nations on transborder data flow will be through the adoption of a National Information Policy. An indirect problem may be Washington's lack of coordination or coherence in developing national information, computer and communications policies. Several European governments recognize the need for rational policy and institutional solutions; seeing the U.S. in disarray doesn't help advance international cooperation in an 'information age'. Ultimately, transborder data flow issues must fit into the context of a U.S. information policy.

It is hoped that such a national information policy will be based on the concept of 'information trade' whereby the U.S. will bargain for the free flow of information and information products through multinational trade negotiations and bilateral agreements with Europe, Japan and other developed nations since the export of information and the import of raw information is seen as being essential to U.S.'s growing information economy. The U.S. must treat these efforts as they would any other industrial sector of their economic health. A step in this direction has already been taken by the recent creation in the U.S. Government of the National Telecommunications and Information Administration (NTIA) whose overall mission is to forge a long-range information policy.

5) INDUSTRY/BUSINESS

In response to the transborder data flow problem and the resulting restrictions being imposed on the free flow of data across borders, industry has argued in favour of the free flow of information across borders primarily on the basis that restrictions would impose burdensome costs (such as duplications of large data banks) for industry and retard the free competitive market system which depends so much on the free exchange of information in competitive markets throughout the world. Despite this definite stand, there appears to be much uncertainty in the position of industry due to the lack of sufficient information on the whole issue of transborder data flow.

A common complaint by data processors is the lack of sufficient hard information about what's going on and what it means. This is attributable in part to developments which are moving from Europe to America, reversing the usual pattern of information flow on computer-communication technology.

Until more clear and coherent directions emerge, the multinationals which have developed their own networks, or utilize service bureaus, are in a state of uncertainty. Strategic planners are not sure how much weight to give to barriers or their costs.

No doubt, some of this uncertainty will be eliminated with the newly created Transnational Data Report (TDR) publication, with the U.S. Department of Commerce recent compilation of Selected Foreign National Data Protection Laws and Bills, and with the continued efforts by industry to organize its offensive against the proponents of restrictions to the free flow of data across borders through such organizations as the International Secretariat for Transborder Data Flows.

6. INTERNATIONAL CONFERENCES

major international conferences have been (or will be) held during the past (or next) year on the transborder data flow problem (major in the sense that the participants include representatives from the European countries, international organizations, U.S. and Canadian governments and business) -

Two major observations can be made pertaining to these conferences on transborder data flow. Firstly, the focus in terms of location of these conferences appears to be shifting from Europe to North America, no doubt from pressures to recognize that Americans (and in particular their multinational corporations) have an important say in this matter. The customary one way flow of information from Europe to America on developments in the transborder data flow issue appears to be giving way to a two-way flow: Europe to America and America to Europe. Secondly, the focus in terms of objective for the conferences appears to be shifting from simply discussing the problems to that of finding solutions to the problems. No doubt this is being precipitated by the fact that international organizations (such as OECD and EEC) have set deadlines for coming up with solutions to these problems as noted earlier.

CONCLUSION

It was recently reported that businessmen believe:

1. that there appears to be more than one dimension, than that of the privacy issue, to the transborder data flow problem (thus contributing to its complexity); and

2. that governments and international bodies are setting policies without any meaningful business representation.

The present study tends to support the first assumption in that it shows that, in addition to the privacy issue, the economic and dependence issues are also being actively pursued by countries and international organizations. However, the second assumption can be challenged on the basis that the present study shows occasions on which business has been asked to provide meaningful input to the problem (especially in the case of the European Parliament and International Conferences). Perhaps the argument centers on 'meaningful' input, in which case the onus is on business to clarify the problem of transborder data flow and indicate the logic of their underlying view of that problem. In other words, there appears to be a need to model (i.e. clarify) the problem of transborder data flow, in which case the present study suggests:

1. possible input for modeling the problem (i.e. economic, dependence, and privacy issues), and

2. possible output for modeling the problem (i.e. responses of countries, international organizations, U.S. Government, etc.). Obviously, a lot of work remains to be done on the actual process occurring

between input and output in order to arrive at a visible model of the transborder data flow problem, that is, at a model which clarifies the problem so that businessmen can provide 'meaningful' input from which rational discussion and solution of the problem can proceed. Considering that transborder data flow is the lifeblood of multinationals, clarifying (i.e. modeling) the problem may be worth the price.